

**A Heavenly Heritage Sdn Bhd v Majlis Perbandaran Pulau
Pinang**

B PLANNING APPEAL BOARD (PENANG) — APPEAL NO LR/PP/42 OF
2012
YEO YANG POH CH, AMIRUDDIN FAWZI BAHAUDIN AND SAN
GANAPATHI
26 NOVEMBER 2015

C *Local Government — Local Planning Authority — Application for planning
permission — Application refused — Appeal against refusal — Whether
respondent acted erroneously or unreasonably in refusing appellant planning
permission — Whether development history of land relevant and material factor*
D *— Whether there was legitimate expectation that authority would not lightly
depart from its earlier planning permission concerning usage of land — Whether
appellant entitled to revive ‘unused density’ from earlier planning permission for
purposes of present application — Whether 2010 Density Guidelines applied*

E On 7 December 2011, the appellant submitted a planning application to
develop a piece of land held under Lot 9934 situated in Jalan Tun Awang, Pulau
Pinang (Lot 9934) into a block of 23-storey apartments, with a four-storey
podium car park and a two-storey community hall. Sometime in 1996, the
appellant had successfully obtained planning permission from the respondent
F (the 1996 planning permission) to develop the lands surrounding Lot 9934 as
a mixed development. In the 1996 planning permission, the appellant had
been required to create and provide a certain number of car parking bays and
motorcycle parking lots on Lot 9934 (1996 car park requirement). However,
the appellant had been unable to comply with the 1996 car park requirement.
G Consequently, when the appellant submitted the present application for
planning permission, the respondent refused planning permission to the
appellant. The respondent claimed, inter alia, that Lot 9934 had been reserved
for use as a car park when the 1996 planning permission had been granted. The
owners of neighbouring lots of land also objected to the appellant’s application
H for planning permission. This was the appellant’s appeal against the
respondent’s refusal to grant it planning permission. In this appeal the
appellant argued that there was nothing in the 1996 planning permission that
required the whole of Lot 9934 to be used solely as a car park. The appellant
contended that if it was able to design a development on Lot 9934 that
I incorporated in it a simultaneous fulfilment of the 1996 car park requirement
then there ought to be no reason why it should not be granted planning
permission. The appellant further submitted that it had not used the maximum
permissible density when it undertook the 1996 development and that it was
therefore now entitled to revive the ‘unused density’ for the purposes of the

present application for planning permission. In addition, the appellant submitted that, if its proposed development of Lot 9934 was allowed, the parking facility it would construct on Lot 9934 would be an improvement of the status quo.

Held, dismissing the appeal with costs of RM20,000:

- (1) The development history of a piece of land was a relevant and material factor, which could not be ignored when a local planning authority considered a planning application affecting that land. While a local planning authority could depart from its previous decision if present circumstances so demanded, such a departure should be done as an exception rather than the rule. In the present case, the planning history of Lot 9934 could be traced back to 1996, when Lot 9934 was earmarked for use as a car park. When the legal principles were transposed into the present case it was clear that there was a legitimate expectation by those objecting to the application that the respondent in considering the present application would not lightly depart from its 1996 planning permission concerning the usage of Lot 9934. It was then for the appellant to present its arguments to try to displace that *prima facie* legitimate expectation (see paras 44, 46 & 50)
- (2) However, there had been a failure on the appellant's part to properly fulfil the car park condition comprised in the 1996 planning permission. On the other side of the coin was the respondent, who equally took no action at all to ensure that the car park condition, which it had imposed in the 1996 planning permission was fulfilled and implemented in a manner that would achieve the objectives in imposing such a condition in the first place (see paras 52 & 56).
- (3) The appellant's argument of 'unused density' did not make sense in planning terms. Density was neither a stand-alone planning factor to be determined by a planning authority in isolation from other planning issues nor to be ascertained solely by the blind application of a mathematical formula. Further, it was important in planning law to ensure that the result of a planning decision did not offend against common sense. In the circumstances, the notion promoted by the appellant that 'unused density' could somehow be impliedly 'reserved' in an application that sought to enjoy less than the permissible maximum density and then be 'revived' at a later date by the applicant was unacceptable. Thus the appellant's claim of entitlement to 'unused density' was misconceived (see paras 63, 65, 69 & 77).
- (4) Further, the respondent was correct in maintaining that the 2010 density guidelines did not apply to the present case. The guidelines were meant only for lands that had never been developed. As such the guidelines were

A not applicable to Lot 9934 and the respondent had not acted erroneously or unreasonably in refusing the appellant planning permission (see paras 72, 77 & 86).

B (5) The appellant's contention that it would design a development on Lot 9934 that incorporated in it a simultaneous fulfilment of the 1996 car park requirement was not accurate because the appellant was unable to provide all the car parking bays set out in the 1996 planning permission (see para 31).

C **[Bahasa Malaysia summary]**

D Pada 7 Disember 2011, perayu telah mengemukakan permohonan perancangan untuk membangunkan sebidang tanah yang dipegang di bawah Lot 9934 terletak di Jalan Tun Awang, Pulau Pinang ('Lot 9934') kepada blok apartmen 23 tingkat, dengan podium parkir kereta empat tingkat dan dewan komuniti dua tingkat. Sekitar 1996, perayu telah berjaya memperoleh kebenaran perancangan daripada responden ('kebenaran perancangan 1996') untuk membangunkan tanah sekeliling Lot 9934 sebagai pembangunan campuran. Dalam kebenaran perancangan 1996 itu, perayu dikehendaki untuk mewujudkan dan menyediakan sebilangan ruang tempat letak kereta dan tempat letak kereta motosikal di Lot 9934 ('keperluan parkir kereta 1996'). Walau bagaimanapun, perayu tidak dapat mematuhi keperluan parkir kereta 1996 itu. Oleh itu, apabila perayu mengemukakan permohonan ini untuk kebenaran perancangan, responden enggan memberi kebenaran perancangan kepada perayu. Responden mendakwa, antara lain, Lot 9934 telah dirizabkan untuk digunakan sebagai parkir kereta apabila kebenaran perancangan 1996 telah diberikan. Pemilik-pemilik lot tanah bersebelahan juga membantah permohonan untuk kebenaran perancangan perayu itu. Ini adalah rayuan perayu terhadap keengganan responden untuk memberikan kebenaran perancangannya. Dalam rayuan ini perayu berhujah bahawa tiada apa-apa dalam kebenaran perancangan 1996 yang menghendaki seluruh Lot 9934 digunakan hanya sebagai parkir kereta. Payeru berhujah bahawa jika ia boleh mereka pembangunan atas Lot 9934 yang memasukkan dalamnya yang serentak memenuhi keperluan parkir kereta 1996 maka sepatutnya tidak perlu ada sebab mengapa ia tidak patut diberikan kebenaran merancang. Payeru berhujah selanjutnya bahawa ia telah tidak menggunakan ketumpatan maksimum yang dibenarkan apabila ia melaksanakan pembangunan 1996 dan bahawa ia dengan itu kini berhak untuk menghidupkan semula 'unused density' itu bagi tujuan permohonan ini untuk kebenaran perancangan. Di samping itu, perayu berhujah bahawa, jika cadangan pembangunannya berhubung Lot 9934 dibenarkan, kemudahan parkir yang akan dibina olehnya di atas Lot 9934 akan merupakan suatu peningkatan daripada status quo.

Diputuskan, menolak rayuan dengan kos RM20,000:

(1) Sejarah pembangunan sebidang tanah adalah faktor yang relevan dan

penting, yang tidak patut tidak dihiraukan apabila pihak berkuasa perancangan tempatan mempertimbangkan permohonan perancangan yang menjejaskan tanah tersebut. Di mana pihak berkuasa perancangan tempatan boleh meninggalkan keputusannya yang terdahulu jika keadaan ini menuntut sedemikian, peninggalan itu patut dilakukan sebagai satu pengecualian dan bukan keputusan. Dalam kes ini sejarah perancangan Lot 9934 boleh dikesan kembali kepada 1996, apabila Lot 9934 telah diperuntukkan untuk digunakan sebagai parkir kereta. Apabila prinsip undang-undang ditukar ke dalam kes ini ia adalah jelas bahawa terdapat jangkaan yang sah oleh mereka yang membantah terhadap permohonan itu di mana responden dalam mempertimbangkan permohonan ini tidak dengan mudah tidak mengikut kebenaran perancangan 1996nya berkenaan penggunaan Lot 9934. Ia adalah untuk perayu untuk mengemukakan hujahnya bagi mencuba menggantikan jangkaan *prima facie* yang sah itu (lihat perenggan 44, 46 & 50).

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- (2) Walau bagaimanapun, terdapat kegagalan di pihak perayu untuk dengan wajar memenuhi syarat parkir kereta yang terkandung dalam kebenaran perancangan 1996 itu. Di pihak satu lagi adalah responden, yang juga tidak mengambil tindakan langsung bagi memastikan syarat parkir kereta itu, yang telah dikenakan dalam kebenaran perancangan 1996 telah dipenuhi dan dilaksanakan dalam cara yang boleh mencapai objektif dalam mengenakan syarat sedemikian pada mulanya (lihat perenggan 52 & 56).

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- (3) Hujah perayu tentang 'unused density' tidak masuk akal dari segi perancangan. Kepadatan bukan faktor perancangan yang berdiri sendiri untuk ditentukan oleh pihak berkuasa perancangan secara berasingan daripada isu-isu perancangan lain dan bukan untuk ditentukan sepenuhnya dengan pemakaian formula matematik. Selain itu, ia adalah penting dalam undang-undang perancangan untuk memastikan bahawa hasil daripada keputusan perancangan tidak bercanggah dengan akal. Dalam keadaan ini, tanggapan yang diperkenalkan oleh perayu bahawa 'unused density' boleh bagaimanapun secara tersirat 'reserved' dalam permohonan yang ingin menikmati kurang daripada kepadatan maksimum yang dibenarkan dan kemudian 'revived' pada satu tarikh terkemudian oleh pemohon tidak dapat diterima. Oleh itu tuntutan perayu berhubung kelayakan 'unused density' telah disalah tanggap (lihat perenggan 63, 65, 69 & 77).

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- (4) Selanjutnya, responden adalah betul dalam mengekalkan bahawa garis panduan kepadatan 2010 tidak terpakai dalam kes ini. Garis panduan itu hanya ditujukan untuk tanah yang tidak pernah dibangunkan. Oleh itu garis panduan itu tidak boleh terpakai kepada Lot 9934 dan responden tidak bertindak secara salah atau tidak munasabah kerana enggan

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- A memberikan kebenaran perancangan perayu (lihat perenggan 72, 77 & 86).
- (5) Hujah perayu bahawa ia akan mereka pembangunan atas Lot 9934 yang memasukkan dalamnya yang serentak memenuhi keperluan parkir kereta 1996 tidak tepat kerana perayu tidak dapat menyediakan semua tempat parkir kereta yang dinyatakan dalam kebenaran perancangan 1996 itu (lihat perenggan 31).]
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Cases referred to

- C *Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors* [1999] 2 MLJ 385, HC (refd)
Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17, CA (refd)
- D *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503, HL (refd)
Majlis Perbandaran Subang Jaya v Visamaya Sdn Bhd & Anor [2015] 5 MLJ 554, CA (refd)
R (on the application of Chisnell) and another v London Borough of Richmond Upon Thames and another [2005] EWHC 134, QBD (folld)
- E *South Bucks District Council v Porter and another* [2003] UKHL 26, HL (folld)
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja' Afar v Datuk Bandar Kuala Lumpur & Anor [2003] 5 MLJ 128, HC (refd)

Legislation referred to

- F Strata Management Act 2013
Strata Titles Act 1985
Town and Country Planning Act 1976 s 2
- G *Lim Mook San (Mah with him) (Shahrizat Rashid & Lee) for the appellant. Shamiyah (Zuraini with her) (Legal Officer, City Council of Penang Island) for the respondent.*
Objectors appeared in person.

H Yeo Yang Poh Ch:

- [1] The appellant is a planning applicant who owns and wants to develop a piece of land measuring approximately 2480sqmt (0.6128 acre), held under Lot 9934, Mukim 13, Daerah Timur Laut, at Jalan Tun Awang ('Lot 9934'); and who seeks to overcome some hurdles placed in its path by reason chiefly of the development history involving it.
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BACKGROUND FACTS

[2] Lot 9934 was formerly a small portion of a much bigger piece of land known as 'Lot 4570' ('the original lot'). In 1996, the appellant (at that time in its capacity as the developer but not yet the landowner) had applied for and successfully obtained a planning permission ('the 1996 planning permission') for a mixed development ('the 1996 development') on the original lot. The 1996 development was divided by the appellant into three parcels, identified by it as 'Parcels A, B and C'.

[3] Pursuant to (and after the completion of) the 1996 development, the original lot was subdivided into several smaller lots with separate titles. According to the appellant, Parcel A became Lot 9872; Parcel B became Lots 9890, 9909, 9934 (ie the subject lot) and 9935; and Parcel C became Lot 9933.

[4] The appellant maintains that the whole 0.6128 acre of Lot 9934 was carved out entirely from Parcel B (see para 2.2(a), on p 9 of the appellant's written submissions); whereas the respondent says that Lot 9934 came from both Parcel A and Parcel B. According to the respondent, the part of Lot 9934 which came from Parcel A measures 0.28 acre, and the remaining part which came from Parcel B measures only 0.3328 acre. This would, in the respondent's view, affect the calculation of permissible density affecting Lot 9934.

However, the difference between the parties on this issue, as we shall discover, has in the circumstances of this case no impact on the final decision reached in this judgment.

[5] It is in any event not disputed that Lot 9934 was (at least) a part of Parcel B; and hence carries with it a development history pertaining to the 1996 development.

[6] The 1996 development comprised the following components:

- (a) a block of 14-storey medium-cost apartments, comprising 111 units ('Rumahpangsa Sri Bukit Jambul');
- (b) 35 units of three-storey terrace houses; and
- (c) three-storey shops/offices.

[7] In the 1996 planning permission, the appellant was required to create and provide a certain number of car parking bays and motorcycle parking lots ('the 1996 car-park requirement'), corresponding with the types and numbers of units of housing and commercial development it was building at that time. More specifically, the 1996 car-park requirement comprised the following (see

A p 58 of the *rekod rayuan*):

(a) 122 car parking bays (including 11 bays for visitors' parking) for the apartments on Parcel A;

B (b) 122 motorcycle parking lots (including visitors' parking) for the apartments on Parcel A;

(c) 72 car parking bays for the shop houses on Parcel C; and

(d) 72 motorcycle parking lots for the shop houses on Parcel C.

C [8] In order to suit its own layout and design at that time, the appellant had planned the 1996 development in such a way that not all the required parking facilities would be provided or located within the confines of the to-be-subdivided lots on which the respective units of buildings were to be built. The appellant's design in 1996 was such that a *balance number of 78 car parking bays and 138 motorcycle parking lots* were to be provided and located on Lot 9934 which was not built-upon (and away from the other eventually sub-divided lots on which buildings were later erected). In other words, the intention in 1996 was for Lot 9934 to be used for parking facilities; and that no residential or commercial building was intended to be built on it. This was, inter alia, shown on the layout plan in the 1996 development.

D [9] That balance number of 78 car parking bays and 138 motorcycle parking lots comprised the shortfall in the following categories (see p 58 of the *rekod rayuan*):

F (a) from Parcel A: six car parking bays (for visitors' parking) and 66 motorcycle parking lots; and

G (b) from Parcel C: 72 car parking bays and 72 motorcycle parking lots.

H [10] Since then, and for some 19 years now, Lot 9934 has been left vacant, without any building or structure on it. It was tarred, and left there for some time to be 'informally' used (apparently by all and sundry) as an open-air car park area, until it was barricaded by the appellant.

I [11] Around 24 November 2008, the appellant submitted a planning application ('the 2008 KM application') to develop Lot 9934. It was an application to build a block of 21-storey apartment (of 46 units). That application was refused by the respondent. Among the reasons for refusal was that Lot 9934 had to be maintained for use as a car park, in accordance with the plans approved in the 1996 planning permission. The appellant did not appeal against that refusal of the 2008 KM application.

[12] On or about 7 December 2011, the appellant made another planning application ('the present KM application') to develop Lot 9934. It was again refused by the respondent. This time, the appellant lodged the present appeal.

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Some owners and residents of units in the apartment known as 'Rumahpangsa Sri Bukit Jambul', which was built pursuant to the 1996 planning permission, had objected to the present KM application. These objectors ('the objectors') attended in person at the hearing of this appeal; and they were given the opportunity of being heard. On two occasions, they were rather ably assisted by one Ms Esther Quah, a student reading law at the time, and a daughter of one of the objectors.

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[13] The present KM application seeks to develop Lot 9934 into a block of 23-storey apartments (containing 53 units), with a four-storey podium car park, and a two-storey community hall/facility. In its application, the appellant hopes, inter alia, to be allowed to take advantage of the increase in the permissible density for that area (from a maximum of 30 units per acre to a maximum of 87 units per acre, which increase was introduced in the year 2010). The appellant further wants to make use of what it claims to be the 'unutilised permissible density' which supposedly results from Parcel B in the 1996 planning permission (something which we will shortly explore).

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[14] The respondent refused the present KM application, for the following four stated reasons:

- (a) Tapak pemajuan (Lot 9934) hendaklah dikekalkan sebagai tempat letak kenderaan seperti pelan yang diluluskan di bawah pelan asal ... (ie referring to the plans approved under the 1996 Planning Permission).
- (b) Tanah pemajuan ini telah diambilkira dalam kiraan ketumpatan untuk pemajuan dalam Fasa B mengikut kelulusan di bawah ... (the 1996 Planning Permission).
- (c) Lokasi gantian tempat letak kenderaan untuk pangsapuri dan kedai/pejabat di 'level 1' dan 'level 2' tidak sesuai kerana cadangan pemajuan adalah berstrata.
- (d) Tidak memperolehi pengesahan daripada Bahagian Perumahan Negeri untuk menggunakan 60 unit rumah kos sederhana rendah yang telah disediakan di atas Lot 432, Sek 1, Bandar Jelutong, DTL, Lorong Perak ...

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For ease of reference, I will refer to the respondent's reason (a) above as the ('development history ground'); reason (b) as the ('density calculation ground'); reason (c) as the ('unsuitable alternative ground'); and reason (d) as the ('low cost requirement ground').

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A THE APPELLANT'S ARGUMENTS ON THE DEVELOPMENT HISTORY GROUND

B [15] The appellant does not dispute the fact that in 1996 it was required, *and that it is still bound today*, to place or locate 78 car parking bays and 138 motorcycle parking lots ('the carried-forward parking bays') on Lot 9934; that being admittedly a condition imposed under the 1996 planning permission. The appellant is at pains to stress that it is not seeking to overturn that condition. It appears that the carried-forward parking bays were meant for public use; although evidence on this aspect is not entirely clear or precise.

C [16] The appellant argues that that condition found in the 1996 planning permission did not stipulate any specific or immutable way in which the carried-forward parking bays must be provided, on Lot 9934. For example, that condition did not say that the carried-forward parking bays must be situated on the ground level only (as opposed to being in a multi-level parking podium, or forming a part of it).

D [17] In other words, the appellant says that that condition did not (and does not) necessarily or *permanently* restrict the use of the *entire* Lot 9934 as a car park only. It did not, and does not, render the whole of Lot 9934 impermissible for any development of any kind. The appellant contends that it is not precluded from developing Lot 9934, so long as it can come up with a reasonable and practical way to simultaneously provide the carried-forward parking bays on a part of Lot 9934, a way which will harmonise (or at least not be in conflict) with a proposed development on that lot. This, the appellant says, is precisely what it will be able and willing to do, in addition to complying with the current car-park requirements relating to its proposed new development. Therefore, the appellant contends that its proposed development of Lot 9934 ought to be allowed.

G [18] The appellant explains that it intends to provide the carried-forward parking bays on two of the levels (identified as '1A, 2 and 2A' if one speaks in terms of the *layers* of a car-park) of a multi-level parking podium which it will construct on Lot 9934 (forming a part of its proposed 23-storey apartments). These two levels will have a separate ramp for entry and exit. They will be separated from the other levels of the parking podium which will be reserved for use by the residents of the proposed new apartments. These two levels will be issued with separate strata titles, which the appellant will be prepared to transfer to the respondent if so required.

I [19] The appellant further says that the following two matters support its position that there should be no obstacle to its proposed development on Lot 9934:

- (a) all these years the respondent has not taken any step to require the surrender of Lot 9934, or to 'zone' Lot 9934 for the purpose of a car park only. Lot 9934 is still zoned 'Perumahan Am'; and A
- (b) the title to Lot 9934 is a first grade grant, with no condition-of-title which restricts its land use. B

[20] As for the fact that, in its planning application made in 1996, it did not earmark Lot 9934 'for future development'; the appellant says that that fact must not be held against it. The appellant advances the proposition that any planning application relating to Lot 9934 that is submitted today 'must be considered afresh based on present planning guidelines' (see the last part of para 2.1(vii), on p 8 of the appellant's written submissions). According to the appellant, the respondent should approach the present KM application on the basis that 'the slate is wiped clean' (see para 2.2(iv), on p 12 of the appellant's written submissions), implying that the history of development affecting Lot 9934 should be ignored or disregarded today; although the appellant's submissions on this point at times appear somewhat muddled or ambivalent (see para 4(ii), on p 26 of the appellant's written submissions). C

[21] The appellant also says that it 'would be willing and able to undertake to pay any compensation in lieu of providing the exact car park bays and motorcycle bays' required of it in the 1996 planning permission (see para 2.1(ix), on p 9 of the appellant's written submissions). The envisaged shortfall referred to here is an issue that I will later visit. D

THE APPELLANT'S ARGUMENTS ON THE DENSITY CALCULATION GROUND E

[22] As alluded to in para 2.3 above, the appellant admits that, under the 1996 planning permission, Lot 9934 formed a part of Parcel B (see para 1.2(ii)(b), on p 4 of the appellant's written submissions). F

[23] Regarding the density calculation ground, the appellant presents the following two-fold argument: G

- (a) for Parcel B (which is in total 2.71 acres), a maximum of 62 units of housing was permissible pursuant to the density restriction applicable in 1996. The appellant had built only 35 units of terrace houses at that time. Therefore, the appellant argues that there are some 'leftover' or 'unutilised density' (from Parcel B in 1996). For the appellant, this means that 'the density calculation for Lot 9934 is separate from that of Parcel B' (see para 2.2(c), on p 10 of the appellant's written submissions); which now entitles the appellant to develop Lot 9934; and H

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- A (b) as the permissible density for that area has been increased, since 2010, to a maximum of 87 units per acre; the appellant says that it is now entitled to take advantage of that increase, to develop Lot 9934. Based on 0.6128 acre (being the size of Lot 9934) and the formula of 87 units per acre, the appellant maintains that it should be allowed to build a maximum of 53 units of apartment on Lot 9934.
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THE APPELLANT'S ARGUMENTS ON THE UNSUITABLE
ALTERNATIVE GROUND

- C [24] The appellant denies the contentions made by the respondent and the objectors that its proposal for the two separate levels of car parks will be problematic and impractical due to legal complications. The appellant says that the following measures that it intends to take will overcome the perceived practical problems:
- D (a) it will provide separate entrance and exit for the two levels of car parks;
- (b) the two levels of car parks can be accessorised to a unit which is owned by the appellant, who will then own and manage the same;
- E (c) alternatively, the two levels of car parks can become stand-alone, and can be issued with a separate strata title, and not be accessorised to any unit at all;
- (d) the maintenance and management of the two levels of car park can be rendered separate from that for the other levels of car park. For this purpose, the appellant will enter into a deed of mutual covenants with each and every purchaser/owner of the proposed apartments, for the former to manage and maintain the two levels of car park; and
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- G (e) the six parking bays meant for visitors to *Rumahpangsa Sri Bukit Jambul* can be identified and demarcated. For these six bays, the appellant proposes a system which it describes as a 'practical solution', although not 'fool-proof' (see para 2.3(viii), on p 22 of the appellant's written submission).
- H [25] In addition, the appellant argues that, if its proposed development of Lot 9934 is allowed, the parking facility it will construct on Lot 9934 will be an improvement of the status quo. It will comprise two levels of covered car parks 'with better security and lighting, proper maintenance, properly demarcated car park lots and mechanised payment system' (see para 2.3(v), on p 21 of the appellant's written submissions).
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THE APPELLANT'S ARGUMENTS ON THE LOW COST REQUIREMENT GROUND A

[26] To the respondent's allegation that it had failed to obtain the relevant confirmation of fulfilment of the requirement to build low-cost housing, the appellant's answer is that the requirement has been met, by virtue of its 'sister company' Genuine Galaxy Sdn Bhd having completed 60 units of low/medium cost apartments elsewhere. The appellant describes these 60 units as 'unutilised' by the said sister company; which the appellant hopes can be accepted as a form of 'surrogate' fulfilment of this condition. As for the absence of a written approval, from the Jabatan Perancangan Pembangunan, of such an arrangement as desired by the appellant; the appellant says that it has already written to the said department on the same, but has not received any response. The appellant asserts that it should not be penalised by a lack of response, because 'there are no clear guidelines to state that such a confirmation letter was a necessity in the application process' (see para 2.4(v), on p 24 of the appellant's written submissions). The appellant goes on to say that, if such a written confirmation is indeed required, it is 'willing to give an undertaking to produce the said letter upon approval of (the present KM application)' — see para 2.4(vi), on p 24 of the appellant's written submissions. B
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COUNTER-ARGUMENTS BY THE RESPONDENT AND THE OBJECTORS

[27] The above summarises the appellant's arguments as to why its appeal should be allowed, and why the present KM application ought to be granted. I will now proceed to summarise the counter-arguments made by the respondent and/or the objectors; and, where appropriate, the appellant's answers to the same (if not already stated above). F
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PARTIES' COUNTER-ARGUMENTS ON THE DEVELOPMENT HISTORY GROUND

[28] In refusing the present KM application, the respondent takes the position that Lot 9934 had, in the 1996 development, been undeniably earmarked and identified for use as a car park. This much is clear, when the 1996 planning permission is read in conjunction with the appellant's layout plans in 1996. Hence, this arrangement was done with the full knowledge and concurrence of the appellant at that time. That was why the appellant proceeded to tar Lot 9934, and to demarcate the parking bays on it with yellow lines. Therefore, the respondent argues, the appellant cannot now deny that Lot 9934 is reserved for use as a car park. On that score, the respondent says that its refusal of the present KM application is a correct decision. H
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- A [29] The objectors support this contention, and add that it is 'unconscionable conduct' for the appellant to now say otherwise. In this regard, they make reference to the case of *Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors* [1999] 2 MLJ 385.
- B [30] Indeed, it is not inappropriate to argue (though neither the respondent nor the objectors have done so in clear terms) that the use of Lot 9934 as a car park was done at the appellant's behest, in order to accommodate its layout and design at that time. If the car parking bays and motorcycle parking lots
- C concerned were not allowed by the respondent to be sited on what later became Lot 9934, the appellant would not have been able to carry out the 1996 development in the way it wanted to, and in the way it eventually turned out. In other words, that arrangement (of siting a large portion of the parking bays on Lot 9934) had benefitted the appellant in the 1996 development.
- D [31] The appellant's response to this argument is that the situation here is very different from the case of *Bencon Development Sdn Bhd*. The appellant explains that, unlike in *Bencon Development's* case, it is not challenging the requirement that the carried-forward parking bays must be provided for on Lot 9934. What it does contend is that, if it is able to design a development on Lot 9934 which incorporates in it a simultaneous fulfilment of the 1996 car-park requirement, then there ought to be no reason why it should not be allowed to do so. There is nothing in the 1996 planning permission that requires the whole of Lot 9934 to be used *solely* as a car park.
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- F

PARTIES' COUNTER-ARGUMENTS ON THE DENSITY
CALCULATION GROUND

- G [32] The respondent rejects, for the following two reasons, the basis used by the appellant in calculating the permissible density that the latter claims Lot 9934 is entitled to:
- H (a) it disagrees with the way the appellant worked out the purported 'unutilised density' said to be left-over from Parcel B in the 1996 development. This disagreement has root in the difference in perspectives which is described in para 2.3 above; and
- I (b) it maintains that the new guidelines which came into effect on 28 June 2010, known as the 'Garispanduan Peningkatan Ketumpatan dan Nisbah Plot di Majlis Perbandaran Pulau Pinang' ('the 2010 density guidelines'), and which brought about the increase in the permissible maximum density from 30 to 87 units per acre, are 'only applicable for land which has not been developed and where the density of the land is not taken into account for another related development' (see para 11.1 of the respondent's written submissions). For that reason, the

respondent says that the 2010 density guidelines cannot apply to Lot 9934; since Lot 9934 was a part of the 1996 development. A

[33] The objectors join the respondent in arguing that the 2010 density guidelines cannot apply to lot 9934. B

PARTIES' COUNTER-ARGUMENTS ON THE UNSUITABLE ALTERNATIVE GROUND

[34] The respondent, in its written submissions, has raised several potential legal complications in the appellant's novel suggestion of combining public parking with accessorised private-parking in the same parking podium (albeit on different levels and with different entries and exits). The appellant has countered the respondent's arguments, by *briefly outlining* how it thinks such issues can be overcome. C D

[35] But none of the parties has provided detailed analysis of these issues, particularly with analysed reference to the relevant provisions in the Strata Titles Act 1985 and the Strata Management Act 2013, in order to support their respective positions. In addition to legal intricacies, practical difficulties also need to be addressed. Even if there are ways to overcome technical issues; how (and whose responsibility it will be) to ensure continuous implementation of such measures is a practical problem that cannot be ignored in planning. E

[36] The objectors dispute the appellant's statement that what the latter proposes to do on Lot 9934 will result in better parking facilities (with regard to the carried-forward parking bays), than what has been provided do-date. The objectors highlight the fact that, in the present KM application, the appellant has not undertaken to provide the full number of parking bays that it is supposed to do (*vis-à-vis* the carried-forward parking bays). Instead of the required 78 car-parking bays it is supposed to provide on Lot 9934, the appellant will only provide 67. The appellant wants to be allowed to pay contributions ('sumbangan') to the respondent, in lieu of providing the balance of 11 parking bays. The objectors say that this is a non-compliance with the appellant's obligations under the 1996 planning permission. F G H

[37] The appellant's answer to this accusation is simply that 'the car park guidelines and the planning permission guidelines provided by the respondent allows the appellant to pay compensation in lieu of physical car parks' (see para 2.5(v) of the appellant's written reply to the objectors' submissions). I

A PARTIES' COUNTER-ARGUMENTS ON THE LOW COST
REQUIREMENT GROUND

[38] This ground has not been vigorously pursued by the respondent and the objectors. The respondent merely asserts that the duty lies on the appellant to procure the relevant letter of approval.

B

ISSUE OF TRAFFIC CONGESTION

C [39] This is an issue brought up by the objectors, not the respondent. Judging from its silence, the respondent appears to be satisfied with the traffic impact assessment ('TIA') report submitted by the appellant.

D [40] The objectors claim that there is already considerable traffic congestion in that area, made worse by the current inadequacy in parking facilities. If Lot 9934 is allowed to be developed; the objectors fear that, not only will the space originally meant for parking be permanently taken away, the increased units of housing accommodation will definitely add to the traffic volume in the area, and further aggravate traffic congestion. However, the objectors have not produced any expert report or other evidence on the traffic issue, apart from a few photographs showing the traffic situation at some points in time.

E

[41] The appellant's reply regarding this issue can be found on p 25 of the appellant's written submissions, namely that:

- F** (a) the appellant has submitted the TIA report to the respondent as required. The respondent has not raised any issue about it;
- (b) it is not the appellant's 'responsibility to ensure the smooth circulation of traffic in that area'; and
- G** (c) the current traffic condition in that area is caused by indiscriminate or haphazard parking, which is an enforcement issue.

DECISIONS OF THE APPEAL BOARD

H [42] Having summarised the respective arguments of the parties, I will now proceed to set out the decisions of this board on the various issues, and also explain the reasons therefor.

ON THE ISSUE OF DEVELOPMENT HISTORY

I

[43] For the determination of this appeal, it matters not whether Lot 9934 was carved out entirely from Parcel B (as the appellant maintains) or from both Parcels A and B (as the respondent contends). This is because, either way, the following facts (and the implications flowing from them) cannot be denied:

- (a) the planning application made in 1996 was in respect of the original lot (Lot 4570), which at that time clearly included the portion of it which was later subdivided and which became Lot 9934. In other words, that portion (which later became Lot 9934) was obviously part of the land in respect of which the 1996 planning application was made; A
- (b) the 1996 planning permission was granted in respect of the original lot, which at that time clearly included the portion of it that was later subdivided and that became Lot 9934. In other words, that portion (which later became Lot 9934) formed an integral part of the land (the original lot) in respect of which the 1996 planning permission was given; B
- (c) therefore, in terms of the planning history affecting Lot 9934 (and putting aside for the moment the question of density-calculation), it is immaterial whether that portion which later became Lot 9934 was at the time described or demarcated as Parcel A, B or C, or a combination of them. What is important is that the portion which later became Lot 9934 was without doubt an integral part of the 1996 development taken as a whole. Perhaps this is what the respondent is trying to say, when it submits that 'Lot 9934 is used in conjunction with Parcel A and Parcel C' (see para 5.1 of the respondent's written submissions); C D
- (d) it is pointed out that, in its planning application in 1996, the appellant did not label the portion which later became Lot 9934 as being 'for future development'. I agree with the appellant that nothing much ought to be read into that fact, because the planned usage of that portion of the land should be discovered from the totality of the circumstances; and does not depend solely on a simple label. On the same token, I do not derive any assistance from the fact that Lot 9934 has not subsequently been rezoned for car-park usage, or been required to be surrendered to the authorities. There is no legal requirement that either of the two steps is mandatory; E F
- (e) similarly, the fact that Lot 9934 is a first grade grant, and that 'car-park usage' is not endorsed on its document of title, has little significance; since the law does not require a planning condition to be endorsed on the title. It is never the law that the owner of a land held under a first grade grant must be allowed by a planning authority to put the land to any kind of use that he desires, just because it is a first grade grant without any condition-of-title. Planning law applies to all lands, including lands held under a first grade grant. As the Court of Appeal has recently held in the case of *Majlis Perbandaran Subang Jaya v Visamaya Sdn Bhd & Anor* [2015] 5 MLJ 554 at para 24: 'land use in a title is quite another matter from the (development) plan or zoning'; G H I

- A (f) when the 1996 planning permission was granted, that portion (of the original lot) which later became Lot 9934 had undoubtedly been taken into account by *both* the appellant and the respondent. It was clearly in the conscious consideration of both the appellant and the respondent that a large portion of the required parking facilities at the time would be located on that portion which later became Lot 9934. Without that agreed and approved usage of the said portion of the land (which later became Lot 9934), the 1996 development could not have proceeded in the way it did. The appellant most probably would have had to downsize its development. The stipulated car-park usage for what subsequently became Lot 9934 was therefore crucial and integral to the 1996 development as a whole. Being the developer (though not the landowner) in 1996, the appellant had itself sought, and benefitted from, that form of approved usage; and
- B
- C
- D (g) as such, in my view it is not correct to describe (what is now) Lot 9934 as a piece of land which has never been a part of the subject matter of a planning permission. In other words, Lot 9934 cannot be treated as a piece of land which has never formed a part of an approved development. This, as we shall discover, will also have a strong bearing on the application or otherwise of the 2010 density guidelines.
- E

[44] The development-history of a piece of land is a relevant and material factor, which cannot be ignored when a local planning authority considers a planning application affecting that land. While it does not mean that a local planning authority can never depart from its previous decision or policy if present circumstances so demand or allow; a departure should be done as an exception rather than the rule. Importantly, a departure should not be done by ignoring planning history; but rather, by providing sound reasons why it is the right thing to do in the circumstances, despite its development-history.

- F
- G [45] In this regard, I derive guidance from *South Bucks District Council v Porter and another* [2003] UKHL 26, where the House of Lords held (at para 18 of the judgment) that: ‘... the planning history of the site, including any recent decisions, will be highly relevant’; and also from *R (on the application of Chisnell) and another v London Borough of Richmond Upon Thames and another* [2005] EWHC 134 (at para 18); where it was held that ‘planning history in relation to the site is a material consideration in connection with a planning application’.
- H

- I [46] The planning history of Lot 9934 can be traced back to 1996, when it was a portion of the original lot. It formed a part of the 1996 development. By reason of the 1996 planning permission, that history had certainly earmarked (what is now) Lot 9934 for use as a car park. It would be quite futile for anyone to deny or ignore this obvious fact.

[47] Notwithstanding the above, there is much force in the appellant's argument that the 1996 planning permission did not necessarily confine the *entire* Lot 9934 for *exclusive* use as a car park. Saying so is an affirmation, and not a denial, of its planning history. That approach could, *if properly undertaken and if other conditions are met*, afford the appellant an alternative ray of hope for obtaining permission to carry out a new development on Lot 9934. I will return to deal with this matter later.

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[48] Meanwhile, continuing with our discussion on the general principle of having to give due regard to the planning history of a site, it is noteworthy that in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128; the court has put it on a higher platform, by holding that a previous decision could in some circumstances give rise to a legitimate expectation that the same decision will again be reached, barring very good reasons to the contrary:

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... the applicant is also capable of having a legitimate expectation that the first respondent when making his decision, will not renege on his previous assurance or reverse his previous policy ... (at p 143A–B)

[49] The court in *Tunku Dato' Seri Nadzaruddin* was speaking of the possible legitimate expectation of a planning applicant with regard to an earlier decision of a planning authority that favoured the planning applicant. There is no reason why the same principle should not apply to give a 'neighbour' (as defined under the Town and Country Planning Act 1976 ('the Act')) a similar legitimate expectation that a planning authority would not lightly depart from an earlier decision that favoured the neighbour.

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[50] Transposed into our present case, it is possible to argue that the objectors (though they have not expressly so argued) have a legitimate expectation that the respondent, in considering the present KM application, would not lightly depart from its two earlier decisions; namely its decision made in the 1996 planning permission concerning the usage of (what is now) Lot 9934, and also its decision in affirming that usage by rejecting the 2008 KM application. It is then for the appellant to present its arguments to try to displace that *prima facie* legitimate expectation. I shall later examine whether or not the arguments put forth by the appellant has managed to do so.

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[51] Bearing in mind the above factual background and the legal principles discussed, I am of the view that the respondent did not err when it took into consideration the planning history of Lot 9934 as depicted above, and decided to reject the present KM application on that basis.

I

- A** [52] There is another aspect of the planning-history of Lot 9934 which must be pointed out; because it reflects a failure on the part of both the appellant and the respondent. This concerns the state of use (and disuse) of Lot 9934, after the 1996 development had been completed. The appellant had tarred the land, and drawn yellow lines to demarcate the parking bays. After that, however, it
- B** appears that the appellant had simply let things take care of themselves. The appellant failed to put proper effort into regulating the use of that car park, or maintaining the same. That is surely a failure on the appellant's part to properly fulfil the car-park condition comprised in the 1996 planning permission.
- C** [53] If the appellant is seeking to say that the car park facilities on Lot 9934 were and are not its responsibility; that can hardly pass muster, after nearly two decades of its silence and inaction. If all these years the appellant in truth had thought so, it would have offered or taken steps to surrender that car-park to
- D** the respondent, or have at least written letters to the respondent to ask the latter to assume responsibility for the management and maintenance of the car park. From the evidence presented to the board, not one of these steps was taken by the appellant.
- E** [54] On the contrary, at some stage (and the evidence is not clear as to exactly when) the appellant barricaded Lot 9934, and prevented its use as a car park. By so doing, the appellant showed that it was in control of Lot 9934, and was responsible for its usage, for otherwise it would have no right to barricade the car park.
- F** [55] It is curious for the appellant to say that Lot 9934 is barricaded because 'no one wanted to pay to park at the said lot and that the usage of the car park was abused due to the open nature of the site' (see para 2.5(i) of the appellant's written reply to the objectors' submissions). Firstly, the car park on Lot 9934
- G** was meant for public use, since all the accessorised car parking-bays for the residents of Rumahpangsa Sri Bukit Jambul are not sited on Lot 9934. Hence, the question of payment could not have been the concern of the appellant. Secondly, if the open nature of the site was the cause of its alleged abuse, it would have been the appellant's responsibility under the 1996 planning
- H** permission to implement appropriate measures in order to put it right, and to comply with the car-park condition imposed in 1996. All said, the appellant has failed to observe that condition.
- I** [56] On the other side of the coin sat the respondent, who equally took no action at all to ensure that the car-park condition which it had imposed in the 1996 planning permission was fulfilled and implemented in a manner that would achieve the objectives in imposing such a condition in the first place. That is nothing short of a sad failure on the part of the respondent as the local planning authority. What is the use of a planning authority carefully imposing

a reasonable and useful condition, if it has no intention, or no will, or no resources to effectively enforce that condition? Surely, the purpose of a meaningful condition cannot end at looking good on paper.

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[57] The respondent must, and I hope it will, learn lessons from this episode, and greatly improve its enforcement-actions henceforth.

B

ON THE ISSUE OF DENSITY CALCULATION

[58] If the appellant is able to overcome the first obstacle placed in its path by planning history, and convince the planning authority that development of Lot 9934 can still be permitted so long as the provision of the carried-forward parking bays will be honoured; there are further hurdles awaiting it. In order to justify the number of units of apartment it wishes to build on Lot 9934, the appellant needs to convince the board that it is right to rely on two contentions, namely: (a) that the appellant is entitled to utilise the alleged 'unused density' carried forward from Parcel B in the 1996 development; and (b) that the 2010 density guidelines (which increased the permissible maximum density to 87 units per acre) is applicable to Lot 9934.

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[59] In a gist, the appellant's first contention concerning 'unused density' may be summarised as follows. When it undertook the 1996 development, the appellant had not sought to make full use of the maximum permissible density at that time, in relation to the original lot. There was thus, according to the appellant, some 'unused density' left from that development, which the appellant ascribes entirely to Parcel B (but whether it pertained to Parcel B or to another portion of the original lot makes no difference to the argument). Since it was not 'used up' in 1996, the appellant says that it is now (almost two decades later) entitled to claim its use for its proposed development today.

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[60] There is no shortage of creativity in the appellant's contention. But does it make planning sense?

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[61] When a planning applicant submits an application for planning permission to carry out a proposed development, what is submitted as one application must naturally be treated as such; and must be considered as a whole by the planning authority. That must be so, whether or not the planning applicant intends to develop his project all at one go, or in stages or phases; and whether or not he chooses to name or divide his proposed development into different parts, parcels or components.

H

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[62] That must be so, from both the perspective of the applicant, and that of the local planning authority. If an applicant does not want any part of his application to be considered along with (and as integrated with) the rest of it,

- A then he would submit separate applications. If a planning authority finds that any part of an application ought to be severed from (or should not be considered together with) the rest of it, then it would require the applicant to put in separate applications.
- B [63] That being the case, and apart from the situation which I will explain in para 63 below, it is difficult to see how the appellant's argument of 'unused density' can make sense in planning terms.
- C [64] Maximum density for a locality merely sets the upper limit of permissibility in terms of the number of units that may be built on a piece of land, depending on its size. A planning applicant is certainly not compelled to seek the maximum density allowable. Nor does it confer on an applicant the right, as a matter of course, to be granted the maximum allowable density. A
- D planning applicant may, for various reasons, not wish to apply for the maximum density in the first place; as for example because of the nature of his proposed development, or his targeted buyers.
- E [65] From the perspective of a planning authority, it is certainly not required to grant the maximum density allowable whenever a planning applicant applies for it. Maximum allowable density is only something a planning authority *may* (and not must) allow, after carefully considering all other relevant planning factors. It is something that has to be assessed in the totality of the circumstances of an application; and viewed as a whole together with other
- F factors involved in a proposed development. Density is not a stand-alone planning factor, to be determined by a planning authority in isolation from other planning issues. Nor is it ascertained solely by the blind application of a mathematical formula, whatever the surrounding circumstances of a case might be.
- G [66] Since whether or not to seek the maximum allowable density is left to a planning applicant when he plans his development, it is therefore a matter for him to decide from the outset of his application what 'level' of density he wants to apply for (up to the stipulated maximum). He cannot postpone that decision
- H for later, or say that he wants to do so in stages or in instalments. Density is not the property of a planning applicant. Density is not an 'asset' that an applicant owns and keeps with the planning authority for future use. It is not in the nature of, say, a sum of money deposited in a bank, which the depositor may withdraw and use as and when he wishes from time to time.
- I [67] There is a conceivable exception of sorts, to the above. It is where, in a planning application (and in the layout plans accompanying it), two features are found. First, it must in substance (and not just in label) be clear from the application itself (and the accompanying plans) that the applicant expressly

and unequivocally excludes a portion of the land from his current proposed development in respect of which he is applying for planning permission. Second, the excluded portion must not *in any way at all* be involved in (or be used in relation to) the current project; so that it is obvious that it is not taken into account by both the applicant and the planning authority with respect to the current application. When correctly analysed, however, such a situation is in truth not a case of an applicant reserving some 'unused density' in his current project for future consumption; but a case of him excluding a portion of the land from his current project and reserving it for possible future development.

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[68] Such is far from the case here, since both the required features do not exist. On the contrary, Lot 9934 was quite clearly involved in the 1996 planning permission, by being used to serve the function of a car park.

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[69] What I have just explained is, in my view, common sense in planning. It is important, in planning law, to ensure that the result of a planning decision does not offend against common sense: see *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503 at p 518; echoed in *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 at p 31.

D

[70] I therefore find myself unable to accept the notion, promoted by the appellant, that 'unused density' can somehow be impliedly 'reserved' in an application that seeks to enjoy less than the permissible maximum density; and then be 'revived' at a later date at the desire of the applicant claiming to be entitled to utilise the 'balance amount' of (or 'leftover') density. The situation described in para 63 above does not arise here.

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[71] The next issue about density is whether the 2010 density guidelines, which (subject to certain conditions) had increased the permissible maximum density for that locality to 87 units per acre, are applicable to Lot 9934.

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[72] The respondent says that those guidelines are meant only for lands that have never been developed; and they do not apply to lands that have been developed. This accords with common sense, since a land that has already been developed and built on surely cannot benefit from guidelines that only come into force after its development. It might be different if a developer is able to completely demolish what has been built on the land, and start afresh by applying for planning permission to re-develop that land as an empty piece of land. This is, of course, not what the appellant is seeking to do here.

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[73] The question which follows, as formulated by the respondent and the objectors, is whether or not Lot 9934 should be treated as a land that has been 'developed'. They submit that it is. The objectors, in particular, refer to the definition of 'development' in s 2 of the Act:

- A 'development' means the carrying out of any building, engineering, mining, industrial, or other similar operation in, on, over, or under land, the making of any material change in the use of any land or building or any part thereof, or the subdivision or amalgamation of lands; and 'develop' shall be construed accordingly.
- B [74] The appellant argues to the contrary. The appellant submits that 'the tarring of Lot 9934 and the drawing of lines for the car park bays does not come within the definition of a 'development' under s 2' of the Act (see para 2.3(ii) of the appellant's reply to the objectors' submissions).
- C [75] Going by the definition of 'development' in the Act, *and if Lot 9934 is looked at by itself and in isolation*, what has been done on Lot 9934 indeed cannot be described as 'building, engineering, mining, industrial, or other similar operation'. At the same time, it is possible to argue that, in the 1996 development, a 'material change in the use of' (what later became) Lot 9934 was made. More importantly, there has definitely been subdivision of the original lot, which gave birth to Lot 9934. Hence, the appellant's wish that Lot 9934 be treated as an undeveloped land is a tall one to accommodate, under the Act.
- E [76] What is most significant, in this aspect, is that the portion of the land (which was later subdivided into Lot 9934) was an integral part of the 1996 development. If that portion of the land was not included in the planning and the development-layout in 1996, the appellant would not have sufficient land-space to house a large proportion of the required car-park facilities; and the 1996 development could not have been carried out in the way it was proposed by the appellant, and approved by the respondent almost two decades ago. That being the case, Lot 9934 was, indisputably, a part of the whole 1996 development. It is not possible to isolate Lot 9934 from the other parts of the original lot that had formed the subject matter of the planning application in 1996. Lot 9934 is *a part of* a land that had been developed way back in 1996.
- G
- H [77] I therefore hold that the respondent is correct in maintaining that, firstly, the 2010 density guidelines are not applicable to Lot 9934, and, secondly, that the appellant's claim of entitlement to 'unused density' is misconceived; and consequently in rejecting the present KM application on this basis as well.

ON THE ISSUE OF UNSUITABLE ALTERNATIVE

- I [78] If the appellant has been able to overcome the first two hurdles of the issues of 'development history' and 'density calculation', then whether or not the creative way in which the appellant has proposed to incorporate the carried-forward parking bays into its project is practical and legally possible, is

an interesting and complex issue that must be explored in considerable depth before any conclusion on it can be arrived at; not least in the light of the Strata Titles Act 1985 and the Strata Management Act 2013 (which recently came into force, on 1 June 2015).

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[79] In view of the fact that the respondent's decision is already upheld by this board on the first two grounds, and for the reasons which I will explain in paras 76–78 below; it becomes unnecessary for us to make a decision on this count, which question is better left for another occasion when the Board can be assisted by fuller submissions on it from the parties.

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[80] However, it is pertinent to highlight the fact that the appellant does not offer to provide *all* of the carried-forward parking bays. Instead, it wants to provide 11 car-parking bays less than what it had been originally required to do in 1996. The appellant offers to pay monetary contribution (*sumbangan*) in lieu of those 11 bays.

D

[81] In such circumstances, I do not see how the appellant is able to claim that its proposed development will not in any way affect its *full compliance* with the 1996 car-park requirement. The appellant is in fact seeking to do less than what it was required to do under the 1996 planning permission.

E

[82] The payment of monetary contribution is generally a very poor substitute for the actual fulfilment of a specific requirement (such as the provision of car park or open space). Monetary contribution ought to be a rare exception, rather than the rule. But it is a practice which this board notices has become far too regular; a trend which I hope will be quickly reversed. The reason, I would have thought, is plain to see. If a requirement is unnecessary or excessive, then it ought not be imposed (or imposed to that extent). No issue of in-lieu monetary contribution will then arise. On the other hand, if a requirement is necessary and reasonable, then it ought to be fulfilled. Monetary payment is not a good substitute for an unfulfilled condition that has been reasonably imposed. Monetary contribution should only be allowed in rare situations where, for some unavoidable reason of practicality, the usual requirement cannot be met (or be fully met); such as in a heritage area where physical space is in short supply (due to historical reasons), and so (eg) the usual ratio of car-parking bays may not be able to be strictly observed.

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ON THE ISSUE OF LOW COST REQUIREMENT

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[83] Since I have held that the 2010 density guidelines do not apply to Lot 9934, it is not necessary for me to decide on this fourth issue.

- A [84] In a case where the 2010 density guidelines do apply, it will be an interesting question whether an applicant can seek to fulfil one of the conditions under the guidelines (ie the one concerning low-cost housing) by ‘borrowing’ units of low-cost houses built by a different (albeit related) company. I would think that that argument will take some convincing. But this
- B is a question that will have to be reserved for a future occasion, if it arises for determination.

ON THE ISSUE OF TRAFFIC CONGESTION

- C [85] This is an issue raised by the objectors, not the respondent. However, the objectors did not adduce any evidence from any expert to support their allegations. On the other hand, the appellant had done and submitted a TIA
- D report, which the respondent had accepted without adverse comment. In the circumstances, I find that the objectors have failed to prove their allegations that unreasonable traffic congestion is likely to result from the proposed project.

CONCLUSION

- E [86] Based on the foregoing, I find that the respondent had not acted erroneously or unreasonably in refusing planning permission of the nature and manner sought by the appellant in the present KM application. This appeal is accordingly dismissed, with costs of RM20,000 to be paid by the appellant to
- F the respondent. This is a unanimous decision of the panel.

PROBLEMS THAT REMAIN TO BE SOLVED

- G [87] Before lifting pen from paper (or rather fingers from keyboard), it has not escaped the board’s notice that, with the respondent’s refusal of the present KM application having been upheld, some current problems in that area will continue to exist. Chiefly, the car park on Lot 9934, required by the 1996 planning permission, has not properly materialised. It will be up to the respondent to see what enforcement measures are available to them, to put
- H matters right.

- I [88] It might also be possible to find an alternative solution which could be beneficial (and more palatable) to the appellant, the respondent and the objectors; if all three parties are able to discuss, cooperate with and accommodate one another (within the bounds of planning law of course).

[89] In this appeal, the board has upheld the decision of the respondent, in respect of its refusal of the present KM applicant in the manner it was

submitted. But the board's decision herein does not mean that no development of whatever nature can ever be permitted on Lot 9934. If the appellant is able to find a way to *fully* incorporate its obligations from the 1996 development into the development it hopes to carry out in the future, and at the same time seek a density that is permissible and reasonable in all the circumstances of the case; the appellant need not think that all doors are completely shut on it.

[90] Of course there will be a question of whether a project that fits the bill in terms of, inter alia, the planning-history of Lot 9934, the outstanding obligations from the 1996 development, and the correctly applied density, could be commercially viable. That will be something for the appellant to work out, if it wishes to make another planning application in the future. It goes without saying that every planning applicant must design his project to comply with the law; and not expect the law to be pliable in order to fit in with his maximum desires.

Appeal dismissed with costs of RM20,000.

Reported by Kohila Nesan

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